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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

In Re Aqua Metals, Inc.
Securities Litigation

CASE NO. 4:17-CV-07142-HSG

CLASS ACTION

**DEFENDANTS AQUA METALS, INC.,
STEPHEN R. CLARKE, THOMAS
MURPHY, and SELWYN MOULD'S REPLY
TO PLAINTIFFS' OPPOSITION TO
DEFENDANTS' REQUEST FOR JUDICIAL
NOTICE**

DATE: January 30, 2020

TIME: 2:00 p.m.

CTRM: 2, 4th Floor

JUDGE: Haywood S. Gilliam, Jr.

Defendants respectfully submit this Reply Memorandum of Law in further support of Defendants' Request for Judicial Notice (ECF No. 128-1, "Defendants' RJN") and in response to Plaintiff's opposition to Defendants' RJN (ECF No. 132).¹

PRELIMINARY STATEMENT

Plaintiffs view of what may be judicially noticed and for what purpose is too narrow. As demonstrated previously in Defendants' RJN, documents may, in certain instances applicable here, be used to establish a fact that cannot be disputed, in addition to determining what information was available to the market or to assess the context in which allegedly false statements were made.

In particular, Plaintiffs oppose Defendants' RJN with regard to Exhibits 31, 32, and 33² which consist of the Individual Defendants' Form 4's filed with the SEC.³ Plaintiffs argue that these documents are irrelevant or otherwise not cited, referenced, or relied upon in the SAC. But the Form 4's are properly judicially noticed for their truth because they contain relevant information required for a holistic assessment of the SAC's scienter allegations, their authenticity is not in question, and Exhibits 32 and 33 form the basis of the SAC's scienter allegations against Mould and Murphy.⁴

¹ All capitalized terms not otherwise defined herein shall have the meanings given them in Defendants' RJN and Defendants' motion to dismiss (ECF No. 128).

² Plaintiffs also oppose judicial notice of Exhibit 30 and Defendants withdraw their request for judicial notice of this Exhibit.

³ The exhibits are attached to the Declaration of Michael R. Hogue dated November 1, 2019 (ECF No. 128-2 (the "Hogue Declaration")).

⁴ Plaintiffs do not oppose judicial notice of the remaining documents (Exhs. 1-29, 34) for the purposes Defendants offer them to demonstrate the information available to the market and the context in which the allegedly false statements were made. (Plaintiff's Opposition to Defendants' RJN at 1:10-13, 132:6-18.) Notably, Plaintiffs essentially make the same arguments as Defendants' RJN in support of their own request for judicial notice. (ECF No. 131-1 ("Plaintiffs' RJN").) Defendants do not oppose Plaintiffs' RJN, but note that, contrary to Plaintiffs' assertions, to decide the motion to dismiss the Court need not consider whether it was Clarke or Murphy that made two of the statements at issue since neither statement is actionable in the first instance (as discussed more fully in Defendants' motion to dismiss).

ARGUMENT

I. The Court Should Take Judicial Notice of Defendants' Form 4's Because They Contain Relevant Information and Their Authenticity Is Not in Question.

Defendants request judicial notice of the Defendants' Form 4's filed with the SEC to show critical facts demonstrating the absence of scienter. Specifically, the Form 4's show that 1) Clarke purchased \$200,000 of Company stock in November bringing his total Company stock ownership up to 1,028,637 shares, and he continued thereafter to purchase Company stock on various occasions (Exh. 31); and 2) Defendants Mould (Exh. 32) and Murphy (Exh. 33), after each selling 60,000 shares of the Company stock as alleged in the SAC, each retained more than 90 percent of their shares. Contrary to Plaintiffs' arguments, these facts weigh heavily against Plaintiffs' allegations of scienter when reviewing the SAC's allegations holistically, and are thus highly relevant and properly judicially noticed on this motion to dismiss.

Courts in this district routinely take judicial notice of such SEC filings and, under precedent from the United States Supreme Court, may do so to refute an inference of scienter. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). In *Tellabs*, the Supreme Court held that "the court's job is . . . to assess all the allegations holistically" and determine whether a "reasonable person would deem the inference of scienter cogent and at least as strong as any opposing inference." *Id.* at 310. In determining whether a complaint gives rise to a strong inference of scienter, a court "must consider the complaint in its entirety, as well as . . . matters of which a court may take judicial notice." *Id.* at 322; *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009).

As Defendants stated in their RJN, the Ninth Circuit has consistently held that SEC filings are judicially noticeable. *See, e.g., Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 & n.7 (9th Cir. 2008) (SEC filings subject to judicial notice); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 (9th Cir. 2006) (same). Courts routinely consider Form 4's when deciding motions to dismiss. *See In re Tibco Software, Inc.*, No. C 05-2146 SBA, 2006 WL 1469654, at *16-*17 (N.D. Cal. May 25, 2006) (taking judicial notice of Form 4's); *In re Int'l Rectifier Corp.*

1 *Sec. Litig.*, No. CV07-02544-JFWVBKX, 2008 WL 4555794, at *1 n.1 (C.D. Cal. May 23, 2008)
 2 (same); *In re Computer Scis. Corp. Derivative Litig.*, No. CV 06-05288 MRP EX, 2007 WL
 3 1321715, at *7 n.5 (C.D. Cal. Mar. 26, 2007) (same). Moreover, the authenticity of the Form 4's
 4 and the facts contained therein are not subject to reasonable dispute. *See* Fed. R. Evid. 201(b).

5 Further, contrary to Plaintiffs' argument regarding judicial notice of Clarke's Form 4's, a
 6 defendant's Form 4's may also be judicially noticed even where there are no allegations in the
 7 complaint supporting scienter as to whether a defendant sold stock. *See Westley v. Oclaro*, 897 F.
 8 Supp. 2d 902, 928-929 (9th Cir. 2012) (rejecting plaintiffs argument that Form 4's could not be
 9 considered in the absence of motive allegations concerning stock sales and judicially noticing the
 10 Form 4's in assessing scienter holistically). To hold otherwise would allow Plaintiff to evade a
 11 determinative argument about scienter by artfully pleading around an inconvenient fact.

12 In *Rigel Pharmaceuticals*, the court considered SEC filings to gauge the sufficiency of the
 13 plaintiff's scienter allegations. *In re Rigel Pharm., Inc. Sec. Litig.*, 2010 WL 8816155, at *13-*14
 14 (N.D. Cal. Aug. 24, 2010).⁵ In dismissing the case, the court ruled that there were insufficient
 15 allegations of scienter because the disclosure at issue, according to the SEC filings, "was made
 16 before any of the Individual Defendants sold a single share of Rigel stock." *Id.* at *14. On appeal,
 17 the court explained, "because none of the defendants sold stock during the period between the
 18 allegedly fraudulent statements and the public disclosure of detailed data, which is the period
 19 during which they would have benefitted from any allegedly fraudulent statements, the value of
 20 the stock, and the stock options does not support an inference of scienter . . . it supports the opposite
 21 inference." *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 884-85 (9th Cir. 2012). Further, the
 22 court reasoned that "especially given the holistic approach to assessing scienter adopted
 23 in *Tellabs* and the requirement that we take into account plausible opposing inferences, we will
 24 not conclude that there is fraudulent intent." *Id.* at 844. As the district court had held, those

25 _____
 26 ⁵ Plaintiffs argue (Plaintiffs' Opposition to Defendants' RJN at n.7) that *Rigel* is distinguishable
 27 because there the court found that none of the statements were actionable, but as discussed in
 28 Defendants' motion to dismiss, none of the statements in the SAC are actionable either. The cases
 are thus all the more applicable, and regardless, are still relevant in a holistic assessment of the
 scienter allegations.

opposing inferences depended on the court considering SEC filings, which showed the absence of sales. *Rigel*, 2010 WL 8816155, at *1 n.1.

Also, while the SAC does not reference the Form 4's specifically, the Form 4's are necessarily the basis for Plaintiffs' allegations regarding Murphy and Mould's stock sales because they are the only public source for the allegations concerning the sale dates, number of shares sold, and price per share, all of which come directly from those Form 4's. (See SAC ¶¶ 494-498 (Murphy sales) and ¶ 494, 499 (Mould sales); Exhs. 32, 33.) The documents thus "form[] the basis of the plaintiff's claim." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 1002 (9th Cir. 2018). In addition to the details alleged in the SAC, the Form 4's state the number of shares owned by the reporting person following each of the sales reported on the Form. As reflected on the Form 4's, Murphy and Mould each retained 725,455 shares after selling 60,000 shares as alleged in the SAC.

Because the Form 4's provide relevant information concerning an inference of scienter, their authenticity is not in question, and courts routinely consider such documents, this Court should take judicial notice of the Form 4's.

CONCLUSION

For the foregoing reason, Defendant respectfully requests that the Court take judicial notice of Exhibits 1-29 and 31-34 to the Hogue Declaration.

DATED: December 20, 2019

GREENBERG TRAURIG, LLP

By: /s/ Michael R. Hogue

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